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No. 00-1829

In the Supreme Court of the United States

ADVANCED STRETCHFORMING INTERNATIONAL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), a successor employer has the right to fix the initial employment terms for its predecessor's employees when the successor, immediately prior to hiring those employees, unlawfully states that there would be "no union" at the new company.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-24a) is reported at 233 F.3d 1176. The original opinion of the court of appeals (Pet. App. 25a-48a) is reported at 208 F.3d 801. The decision and order of the National Labor Relations Board (Pet. App. 53a-67a), and the decision of the administrative law judge (Pet. App. 70a-100a), are reported at 323 N.L.R.B. 529.

JURISDICTION

The amended opinion of the court of appeals (Pet. App. 2a) was issued on November 22, 2000. A petition for rehearing was denied on February 7, 2001 (Pet. App. 101a-102a). On April 23, 2001, Justice O'Connor extended the time within which to file a petition for a

writ of certiorari to and including June 7, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), obligates an employer to bargain collectively with the union that represents its employees. That obligation also extends to the employer's "successor." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987); *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). A new employer is a successor to the former employer if (1) "substantial continuity" exists between the employers' respective enterprises and (2) a majority of the successor's employees had been employees of the predecessor. *Fall River Dyeing*, 482 U.S. at 43, 46; *Burns*, 406 U.S. at 278-280 & n.4.

A successor is not bound to honor the predecessor's labor contract and, as a general rule, it is free to set the initial terms upon which it will hire the predecessor's employees. *Burns*, 406 U.S. at 291, 294. Where it is "perfectly clear that the new employer plans to retain all of the employees in the unit," however, the successor is obligated to "initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-295. A successor also "loses the right unilaterally to set the initial terms" if the successor "refuses to hire its predecessor's employees based upon anti-union animus." *Capital Cleaning Contractors, Inc.* v. *NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998).

2. Before December 1, 1992, Aero Stretch, Inc. (Aero) operated a manufacturing facility in Gardena, California. Pet. App. 3a, 54a. Aero's production and maintenance employees were represented by Amalga-

mated Local Union No. 509, UAW. *Id.* at 3a, 71a-72a. Aero and the Union entered into a collective-bargaining agreement effective from August 19, 1991 through August 19, 1994. *Id.* at 3a, 54a. On June 11, 1992, Aero filed for bankruptcy protection but continued to operate the plant and began to gradually lay off employees. *Id.* at 3a, 54a, 72a. On November 19, 1992, the bankruptcy court auctioned Aero's assets to Steven Brown, who continued the plant's operations. *Id.* at 3a-4a, 73a. On that date, the bankruptcy court ordered Aero to terminate all of its employees by November 30. *Id.* at 4a, 54a, 74a.

On November 30, 1992, Eric Cunningham, an Aero official, acting on Brown's instructions, held an employee meeting at the plant. Pet. App. 4a, 77a. Cunningham informed the employees that the plant had been purchased by a new company, that all employees would be terminated from employment with Aero effective at the end of the work day, and that, if they were interested in working for the new company, the employees should report to the plant the following morning for a job interview. *Id.* at 4a, 77a-78a. During the November 30 meeting, Cunningham also told the employees that there would be "no union" at the new company. *Id.* at 4a, 54a-55a, 83a.

On December 1, 1992, Brown incorporated petitioner Advanced Stretchforming International, Inc. Pet. App. 4a, 54a. On December 1, Brown and Cunningham interviewed the former Aero bargaining unit employees who came to the plant seeking employment. *Id.* at 4a, 55a, 74a. Brown informed the applicants that employment with petitioner would be on different terms than those provided by Aero's labor contract with the Union, and he required each applicant to sign a written statement reflecting that understanding. *Id.* at 4a-5a, 55a.

Also on December 1, petitioner hired eight of the former Aero bargaining unit employees, and did not hire employees from any other source at that time. Pet. App. 5a, 55a, 74a. Of the eight employees hired, petitioner continued to pay four of them at their existing hourly wage rate; four others were hired at different wage rates. *Id.* at 5a, 55a, 79a. Petitioner reduced or eliminated the employees' benefits, such as holidays and medical benefits. *Id.* at 55a, 79a. Employing that staff, petitioner immediately began to complete Aero's work in progress and to prepare for new similar work. *Id.* at 74a.

On December 3, 7, and 11, 1992, the Union sent certified letters to petitioner demanding that it recognize the Union as the employees' bargaining representative. Pet. App. 5a, 74a. On December 14, 1992, petitioner conducted a poll of the employees respecting their desire for continued representation by the Union. The result of the poll was unfavorable to the Union. *Id.* at 5a, 74a, 85a. The same day, petitioner advised the Union in writing that it did not recognize the Union as the employees' bargaining representative. *Id.* at 5a; see also *id.* at 58a-59a, 74a, 85a.

3. On April 30, 1993, acting on a charge filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner was a successor employer to Aero and that petitioner had committed numerous violations of the Act. Pet. App. 5a, 71a. After a hearing, an administrative law judge (ALJ) sustained the complaint in part. *Id.* at 70a-96a. The ALJ found that, under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), petitioner was a successor employer to Aero (Pet. App. 75a), and that Cunningham was acting as petitioner's agent when he made the "no union" state-

ment during the in-plant meeting with Aero's employees on November 30, 1992 (*id.* at 83a-84a). The ALJ found that, by issuing the "no union" statement, petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). Pet. App. 91a.[1] The ALJ noted the "extreme[]" "likelihood that the 'no union' statement would signal employees that their continued employment was dependent upon the abandonment of their Union adherence." *Id.* at 90a.

The ALJ further found that, as a *Burns* successor, petitioner was obligated to recognize and bargain with the Union as the representative of the former Aero employees. Pet. App. 84a. He further found that petitioner had committed unfair labor practices by refusing on December 14 to recognize the Union and conducting an employee poll in violation of the Act. *Id.* at 89a, 91a-92a. The ALJ dismissed the complaint, however, insofar as it alleged that petitioner violated Section 8(a)(5) and (1) by setting initial employment terms for the former Aero employees on December 1 without first bargaining with the Union. *Id.* at 75a- 83a, 92a.[2]

4. The Board affirmed in part and reversed in part. Pet. App. 53a-67a. The Board affirmed the ALJ's findings, which were not contested by petitioner, that the "no union" statement, polling of unit employees, and refusal to recognize the Union constituted unfair labor practices. *Id.* at 55a & n.4. The Board further found

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[1] The Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their "right * * * to bargain collectively through representatives of their own choosing." 29 U.S.C. 157, 158(a)(1).

[2] The ALJ concluded that petitioner was not a *Burns* "perfectly clear" successor as the Board has defined that term. Pet. App. 75a-76a, 81a-82a (citing *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975) (Table).

that petitioner violated Section 8(a)(5) and (1) "by unilaterally changing its employees' wages and other terms and conditions of employment at the time of their hire." *Id.* at 54a. The Board observed that there existed a "well-established exception to the right of a *Burns* successor to set initial terms and conditions of employment," namely, that "an employer * * * that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting with the Union." *Id.* at 57a. The "fundamental premise" of this "forfeiture doctrine," the Board explained, is that "it would be contrary to statutory policy to 'confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred.'" *Id.* at 58a (quoting *State Distributing Co.*, 282 N.L.R.B. 1048, 1049 (1987)).

Noting the uncontested fact that petitioner "was a *Burns* successor bound to recognize the Union when plant operations resumed on December 1," the Board explained that, "[a]t the time of successorship * * * [petitioner] did not conduct itself like a lawful *Burns* successor." Pet. App. 58a. Rather, petitioner "unlawfully declared through Cunningham to all Aero employees that there would be no union for those whom it hired." *Ibid.* "This statement," the Board explained, "was a clearly unlawful message to employees that [petitioner] would not permit them to be represented by a union." *Id.* at 55a. The Board further explained that "[n]othing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment." *Id.* at 59a.

Rather, the Board concluded that "[a] statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force," for it "'block[s] the process by which the obligations and rights of such a successor are incurred.'" *Ibid.* (quoting *State Distributing Co.*, *supra*).

As a remedy, the Board ordered petitioner, "on request of the Union, to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent [petitioner's] unlawful conduct, until [petitioner] negotiates in good faith with the Union to agreement or to impasse." Pet. App. 60a. The Board explained that such a remedy is "designed to prevent [petitioner] from taking advantage of its wrongdoing to the detriment of the employees," and that a "return to the status quo ante at least allows the bargaining process to get under way." *Ibid.* (quoting *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1322-1323 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992)).

5. a. The court of appeals granted in part and remanded in part the Board's petition for enforcement. Pet. App. 1a-13a.[3] The court of appeals granted summary enforcement of the Board's uncontested findings that petitioner committed unfair labor practices by making the "no union" statement, conducting the union

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[3] Initially, a divided panel of the court of appeals had upheld the Board's order on the ground that petitioner was a "perfectly clear" successor to Aero, and therefore was not free to unilaterally set initial terms of employment. Pet. App. 33a-35a. Because the court of appeals upheld the Board's unfair labor practice finding on a theory not invoked by the agency, the Board filed a petition for rehearing and rehearing en banc. *Id.* at 2a; see generally *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

representation poll, and refusing to bargain with the Union. *Id.* at 6a. The court of appeals further upheld the Board's conclusion that petitioner violated Section 8(a)(5) and (1) by "fail[ing] to consult with the Union before imposing terms." *Id.* at 10a. The court found that, "as a practical matter," the "no union" "statement 'blocked the process by which the obligations of a successor are incurred' in a manner similar to the discriminatory hiring practices to which the forfeiture doctrine previously has been applied." *Id.* at 9a, 10a.

On the question of remedy, however, the court of appeals remanded the case to the Board for further proceedings. Pet. App. 10a-13a. The court of appeals observed that the evidentiary record in this case was "equivocal" as to "what would have happened had [petitioner] recognized and bargained with the Union." *Id.* at 12a-13a. The court explained that, as a general rule, "the Board's grant of back pay based on the predecessor Union's pay scale restores as nearly as possible the employment situation that would have occurred," absent the violation of the Act. *Id.* at 11a (quoting *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460, 1468-1469 (9th Cir.), cert. denied, 522 U.S. 948 (1997)). The court added, however, that where "'[t]he facts demonstrate that [the successor] would not have agreed to union demands to pay the higher rate,' the successor may not be required 'to pay the higher rate beyond a period allowing for a reasonable time of bargaining.'" *Ibid.* (quoting *Kallmann* v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981) (bracketed material added by court of appeals)). "Because the record was not fully developed on this point," the court remanded the case to the Board "to permit [petitioner] and the UAW to present evidence on whether [petitioner] would have bargained to impasse and imposed terms,

even had [petitioner] honored its obligation to bargain with the Union." *Id.* at 13a.

b. Judge O'Scannlain concurred in part and dissented in part. Pet. App. 13a-24a. He concurred in the court's enforcement of the Board's order of prospective relief, *id.* at 14a, but took the view that "the Board's award of back pay under the terms of the collective bargaining agreement of [petitioner's] predecessor violates the holding of [*Burns*]," and "constitutes a penalty well in excess of the Board's legal authority." *Ibid.*

ARGUMENT

1. Addressing an issue of first impression, the court of appeals properly held that petitioner forfeited its right under *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), to set the initial terms of employment when it made the "no union" statement. It is undisputed that petitioner, as a successor employer to Aero, was obligated by Section 8(a)(5) of the Act to recognize and bargain with the Union when petitioner initially began operating the former Aero facility with a work force comprised entirely of employees from the former Aero bargaining unit. *Burns*, 406 U.S. at 278-279, 280-281; see Pet. App. 7a, 58a, 75a, 84a. Rather than honor that obligation, petitioner unlawfully stated to the former Aero employees that there would be "no union" at the new company. *Id.* at 6a, 55a, 83a. As the Board found, petitioner's statement sent "a clearly unlawful message to employees that [petitioner] would not permit them to be represented by a union" (*id.* at 55a), and "blatantly coerce[d] employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing." *Id.* at 59a.

This Court has recognized that, "after being hired by a new company * * * employees initially will be concerned primarily with maintaining their new jobs." Such employees "might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987); see also Pet. App. 58a. Petitioner's "no union" threat allowed it to capitalize upon those well-recognized employee predilections. As the ALJ observed, coming as it did "in the course of informing employees for the first time about the certainty of a continued operation and immediately in advance of the initial selection of employees for the new entity," the "no union" threat signaled the employees in the Aero unit that "their continued employment was dependent upon the abandonment of their Union adherence." *Id.* at 89a-90a.[4] Accordingly, petitioner's actions effectively assured that its bargaining obligation under *Burns* would be rendered a nullity.

Like the successor who engages in unlawful hiring discrimination, petitioner's illegal "no union" threat "blocked the process" by which its bargaining obligation would have been made effective. See Pet. App. 9a-10a, 57a-59a. The successor that engages in hiring discrimination seeks to assure that a numerical majority of its work force will not be comprised of the pre-

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[4] As the Board noted (Pet. App. 58a-59a), petitioner reinforced its coercive "no union" message by conducting an unlawful employee poll on December 14 and refusing to recognize the Union. The negative outcome of the unlawful poll served to provide an ostensible air of legitimacy to petitioner's "no union" stance. The refusal to recognize the Union further demonstrated to the former Aero employees that it would be futile for them to attempt to exercise their Section 7 right to bargain collectively.

decessor's employees, thereby allowing the successor to "block[] the process" by which the obligation to bargain with the incumbent union would otherwise attach. *Fall River Dyeing*, 482 U.S. at 46 & n.12; *Burns*, 406 U.S. at 278-279, 280-281; see, *e.g.*, *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1316-1319 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992); *Pace Indus., Inc.* v. *NLRB*, 118 F.3d 585, 587-593 (8th Cir. 1997), cert. denied, 523 U.S. 1020 (1998). Similarly, by issuing the "no union" threat, petitioner sought to "block[] the process" by which its obligation to bargain with the Union might, as a practical matter, have been made effective. In those circumstances, the Board properly concluded that petitioner forfeited its right under *Burns* to set initial terms of employment.

2. Petitioner contends (Pet. 13-17) that this Court's review is warranted because the court of appeals' decision conflicts with *Burns*. Petitioner argues that, although the successor employer in *Burns* had committed an unfair labor practice by recognizing and assisting a rival to the incumbent union, 406 U.S. at 274-277, the Court upheld only the Board's ordering that the successor employer bargain with the incumbent union, *id.* at 281, while recognizing the successor's right to set initial terms of employment, *id.* at 294. The Court in *Burns* did not address, however, the Board's remedial authority when a successor employer unlawfully departs from the legal framework that the Court set forth in *Burns*. Nor did the Court address the effect of the successor's unlawful recognition of the rival union upon its right to set initial employment terms. As the Board correctly explained, although a successor ordinarily possesses a right unilaterally to set initial terms (*ibid.*), "[n]othing in *Burns* suggests" that a successor may avail itself of the right recognized in

Burns and, at the same time, impose "an unlawful condition" of employment on the predecessor's employees. Pet. App. 59a. Rather, that *Burns* right "must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions." *Id.* at 58a.

Thus, as *Burns* itself recognizes, a successor's right to set initial employment terms is but one aspect of the panoply of rights and obligations of a successor under the system of collective bargaining established by the Act. See 406 U.S. at 277-296. While a successor acts within its rights in rejecting the predecessor's collective bargaining agreement and, ordinarily, in setting initial terms, the successor, concomitantly, must recognize and bargain with the incumbent union with respect to wages, hours, and other terms and conditions of employment. See *id.* at 280-281, 291, 294; see also 29 U.S.C. 158(d). That legal framework necessarily contemplates that, through the process of good-faith collective negotiations with the incumbent union, terms of employment which the successor may choose to initially set unilaterally will be subject to alteration, and that different terms may ultimately be incorporated into a new collective bargaining agreement.

In this case, petitioner, by its own actions, upset that bargaining dynamic: it sought the benefit of setting initial terms while it evaded the obligation to bargain with the Union, thereby breaking the linkage between benefit and obligation that is required by the Act. Thus, a remedial order limited only to an order to refrain from committing future unfair labor practices, as suggested by petitioner (Pet. 19), would do nothing to restore the parties to the *status quo ante.* See

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177, 194 (1941) (purpose of remedial order is "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [conduct]"); see also Pet. App. 7a n.2 (explaining that the forfeiture doctrine does not act as a "penalty" but "merely places the parties in the position where they would have been had [petitioner] refrained from engaging in improper conduct"). Indeed, the result urged by petitioner would permit employers such as petitioner to benefit from their wrongdoing by insulating the employer's initial terms from modification through collective bargaining until a court later forces the employer to comply with the law.

3. Petitioner contends (Pet. 17-20) that the court of appeals' decision conflicts with *Capital Cleaning Contractors, Inc.* v. *NLRB*, 147 F.3d 999 (D.C. Cir. 1998). That contention lacks merit. In *Capital Cleaning*, the District of Columbia Circuit "join[ed] every other court to have considered the issue," and held that "when a successor refuses to hire its predecessor's employees based upon anti-union animus, the successor loses the right unilaterally to set the initial terms and conditions of employment; it must first bargain with the union." *Id.* at 1008.[5] The District of Columbia Circuit did not address whether, much less hold that, the "forfeiture doctrine" applies only to that circumstance. Indeed, the District of Columbia Circuit explained that the employer's "antiunion discrimination makes it diffi-

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[5] Petitioner therefore errs in contending (Pet. 22-23) that the courts of appeals are confused whether the forfeiture doctrine is ever appropriate. Petitioner cites no court that has accepted its view, but rather relies on the views expressed by dissenting judges on two courts of appeals.

cult to determine how many of its predecessor's employees it would have hired," and that the resulting uncertainty is reasonably resolved against the successor. *Ibid.* That reasoning fully supports the court of appeals' decision in this case. Petitioner's coercing of the predecessor's employees into abandoning the incumbent union created a comparable uncertainty as to what legitimate terms of employment would have applied to the former Aero workers whom it hired on December 1, had petitioner complied with its duty to recognize and bargain with the Union.[6]

4. Petitioner contends (Pet. 20) that this Court's review is warranted to resolve a circuit "split over the proper remedy under the forfeiture doctrine." Petitioner urges the Court to adopt the view of the Sixth and District of Columbia Circuits, which have held that any award of back pay is limited to a period of a "reasonable time of bargaining." Under that view, the successor is "responsible for the pay difference for the time which would have been required for bargaining" where "the facts indicate[] that the employer would not have agreed to union demands to pay the higher rate." *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (6th Cir. 1987), cert. denied, 486 U.S. 1042 (1988); see also *Capital Cleaning Contractors, Inc.*, 147 F.3d at 1011 (relief limited to "a period allowing for a reasonable time of bargaining" when "there is no reason to believe that [the successor] would have agreed to paying any more

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[6] Contrary to petitioner's suggestion (Pet. 18), the court of appeals did not hold that the forfeiture doctrine applies to "a successor employer who commits *any* unfair labor practice during the transition process." Rather, the court limited the question before it to "whether [petitioner's] 'no union' statement" was sufficiently similar to discriminatory hiring practices so as to warrant an application of the forfeiture doctrine. Pet. App. 9a.

than it had to for labor"). Petitioner further contends (Pet. 20) that the Second, Seventh, and Ninth Circuits hold that the Board may "award back pay according to the terms of the prior [collective bargaining agreement] for the entire period from the date of the unfair labor practice until the successor employer reaches or would have reached a new agreement or an impasse with the predecessor's employees."

This case, however, is not an appropriate vehicle to resolve whatever tension exists on that issue, because the court of appeals remanded the case to the Board in order to permit petitioner to establish that any back pay award should be limited to a period "allowing for a reasonable time of bargaining." Pet. App. 10a, 11a (quoting *Kallmann* v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981)). On remand, the Board must "permit [petitioner] and the UAW to present evidence on whether [petitioner] would have bargained to impasse and imposed terms, even had [petitioner] honored its obligation to bargain with the Union." *Id.* at 13a. Hence, this case is in an interlocutory posture in which the court of appeals' decision permits petitioner on remand to obtain the limitation on relief that it seeks, if a more fully developed record shows that such limitation is factually appropriate. The outcome of the remand proceeding would again be subject to review by the court of appeals. It would therefore be premature for this Court to undertake to address, at this juncture in the case, the appropriate remedy under the forfeiture doctrine.[7]

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[7] Moreover, it is not clear that the Second and Seventh Circuits have rejected the "reasonable time of bargaining" rule sought by petitioner. In neither *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858 (2d Cir. 1996) (per curiam), nor *U.S.*

5. Petitioner finally asserts (Pet. 23-25) that the court of appeals' decision will discourage successor employers from attempting to revive a failing business because they may learn many years after the fact that they are bound to the terms of the predecessor's labor agreement. As previously discussed, however, the court of appeals' decision merely prevents petitioner from benefitting from its unlawful conduct. The court's decision does not bind petitioner to its predecessor's labor agreement, but simply applies its terms for a limited period of time as a baseline for awarding relief. Moreover, it is unpersuasive for petitioner now to complain (Pet. 25) that the court of appeals unfairly "foisted" on petitioner its predecessor's labor agreement ten years after petitioner took over Aero's business. In November 1994, the ALJ issued his decision finding that petitioner had issued the illegal "no union" threat, had conducted an unlawful poll, and had unlawfully refused to recognize and bargain with the Union. Pet. App. 70a-96a. Petitioner has never contested those findings, *id.* at 6a, 53a, and has never commenced bargaining with the Union. Indeed, had petitioner reached agreement (or impasse) with the Union through good-faith bargaining, petitioner might have established an empirical basis for determining that it would not have agreed to employment terms more favorable than it initially set. See *Armco, Inc.*, 298 N.L.R.B. 416 (1990). Thus, petitioner has heretofore failed to avail itself of ample opportunity to limit its litigation exposure in this case, and it may still succeed in doing so in the pro-

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Marine Corp. v. *NLRB*, *supra*, cited by petitioner (Pet. 20), did the court of appeals expressly consider and reject the propriety of imposing a "reasonable period of bargaining" limitation on the Board's award of relief.

ceedings on remand that the court of appeals has ordered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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